

No. 76-1001

Supreme Court, U. S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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EUGENE MCCARTHY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR THE FEDERAL COMMUNICATIONS  
COMMISSION IN OPPOSITION

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**OPINIONS BELOW**

The orders of the court of appeals (Pet. App. A. 22 to A. 27) are unreported. The opinion of the Federal Communications Commission (Pet. App. A. 1 to A. 21) is not officially reported.

**JURISDICTION**

The judgment of the court of appeals was entered on October 21, 1976. The petition for a writ of certiorari was filed on January 19, 1977. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

Whether the Federal Communications Commission erred in concluding that broadcast stations need not

give equal time to all "major" candidates for public office who are not invited to participate in broadcast debates between or among other candidates.

#### STATUTE INVOLVED

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. (and Supp. V) 315(a), is set out at Pet. 5-6.

Section 315(d) of the Communications Act of 1934, as added, 66 Stat. 717, and redesignated, 47 U.S.C. (Supp. V) 315(d), provides:

The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

#### STATEMENT

As originally enacted, Section 315 of the Communications Act of 1934, 48 Stat. 1088, provided that:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station \* \* \*.

In 1959, Section 315 was amended to exclude four categories of news programs from the equal time rule: (1) bona fide newscasts; (2) bona fide news interviews; (3) bona fide news documentaries; and (4) on-the-spot coverage of bona fide news events.<sup>1</sup> For more than a decade, however, the Federal Communications Commission interpreted the news interview and news event exemptions as not applying to debates between candidates (*The*

<sup>1</sup>The 1959 amendments were prompted by the Commission's decision in *Columbia Broadcasting System, Inc. (Lar Daly)*, 18 P & F Radio

*Goodwill Station, Inc.*, 40 F.C.C. 362; *National Broadcasting Co.*, 40 F.C.C. 370) or to candidates' press conferences (*Columbia Broadcasting System, Inc.*, 40 F.C.C. 395).

In 1975, in response to petitions from the Aspen Institute Program on Communications and Society and CBS, Inc., the Commission reconsidered these decisions. Concluding that it had misinterpreted the applicable legislative history, the Commission overruled *Goodwill Station*, *National Broadcasting Co.*, and part of *Columbia Broadcasting System*. The Commission concluded that a station broadcasting a debate between or among candidates for office, and sponsored by an unrelated third party, need not provide broadcast time to nonparticipating candidates if the debate is a bona fide news event. The court of appeals upheld the Commission, and this Court denied certiorari. *Aspen Institute*, 55 F.C.C. 2d 697, affirmed *sub nom. Chisholm v. Federal Communications Commission*, 538 F. 2d 349 (C.A. D.C.), certiorari denied *sub nom. Democratic National Committee v. Federal Communications Commission*, October 12, 1976 (Nos. 76-101 and 76-205).

In the fall of 1976 many radio and television stations decided to broadcast a series of debates, sponsored by the League of Women Voters, between President Ford and Governor Carter. The first debate was held on September 23. On September 24 petitioner, a candidate for President on the ballot in most States, filed with the Federal Communications Commission a request for an

Reg. 238, reconsideration denied, 26 F.C.C. 715, that licensees must afford equal exposure to all qualified candidates whenever any candidate appears on a regularly scheduled newscast. Congress feared that the *Lar Daly* rule "would tend to dry up meaningful radio and television coverage of political campaigns." S. Rep. No. 562, 86th Cong., 1st Sess. 10 (1959).



order requiring the stations to provide him with equal time. Petitioner accepted the *Aspen Institute* rule but argued that the debate did not qualify for an exemption from the equal time requirement because there had been collusion between the broadcasters and the candidates. Petitioner also asserted that the exclusion of any "major" or "serious" candidate from a presidential debate violates the *Aspen Institute* rule, and that he was the only "major" presidential candidate to be excluded.

On October 5, 1976, the Commission denied petitioner's request for relief. It concluded that a debate is a bona fide news event, exempt under the *Aspen Institute* standards from the equal time requirement, if (a) the debate is broadcast live and in its entirety, (b) the broadcaster makes a good faith determination that the debate is newsworthy, and (c) there is no evidence of broadcaster favoritism or collusion (Pet. App. A. 8). The Commission found that the 1976 presidential debates satisfied those criteria.<sup>2</sup>

Petitioner sought review in the United States Court of Appeals for the District of Columbia Circuit. That court affirmed the Commission's decision, holding that petitioner's rights "can be satisfied by reasonable opportunities to have [his] views presented in contexts outside of the debates" (Pet. App. A. 27).<sup>3</sup>

<sup>2</sup>The Commission observed (Pet. App. A. 14 to A. 17) that the exemption of some debates from the equal time requirements does not exempt broadcasters from their fairness doctrine obligations with respect to the overall coverage of candidates during the course of a campaign. It concluded, however, that petitioner had not established any violation of the fairness doctrine.

<sup>3</sup>Petitioner had sought a writ of certiorari before judgment. That petition (No. 76-484) was denied on October 5, 1976.

## ARGUMENT

The decision of the court of appeals is correct and does not require review by this Court.

This case does not present any question with respect to petitioner's "right" to participate in any debate. The Communications Act does not empower the Commission to compel sponsors of debates to invite petitioner or any one else to participate. The Commission's function is limited to determining whether broadcasters are required by law to offer equal time to candidates who were not invited to participate.<sup>4</sup>

*Aspen Institute* establishes criteria for determining when that obligation arises. Although disclaiming any attempt to do so (Pet. 12), petitioner in effect challenges the *Aspen Institute* decision by arguing that all "major" candidates must be allowed to participate in debates or be offered equal time. Even if the statute would permit the Commission to adopt such a rule (and nothing in the Act distinguishes between "major" and "minor" candidates, or indicates how such categories would be defined), the Commission was not required to adopt petitioner's proposal for determining when a campaign debate is a *bona fide* news event.

The Commission's construction of Section 315 "should be followed unless there are compelling indications that it is wrong \* \* \* ." *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381. *Aspen Institute* is a reasonable construction of Section 315.

<sup>4</sup>Petitioner seems to suggest that the Constitution itself imposes an equal time requirement upon broadcasters. This is incorrect. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94.

and none of petitioner's arguments undercuts the Commission's decision.<sup>5</sup>

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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<sup>5</sup>Petitioner's contention (Pet. 19-20) that the Commission has unconstitutionally discriminated between presidential candidates and candidates for all other offices is insubstantial. The *Aspen Institute* criteria are applicable whenever a broadcaster chooses to broadcast a debate between candidates for any office. The *Goodwill* and *National Broadcasting Co.* decisions, which were expressly overruled by *Aspen Institute*, involved debates between gubernatorial candidates.